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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1073

GEORGE P. SHULTZ, *et al.*,

Appellants,

—v.—

CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., *et al.*,

Appellees.

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,

Appellant,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

No. 72-1196

FORTNEY H. STARK, JR., *et al.*,

Appellants,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES FORTNEY H. STARK, JR., *ET AL.*

(Appellees in No. 72-1073)

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INDEX

PAGE

Summary of Judgment 2

I. The Bank Secrecy Act is an indivisible whole which cannot be severed or litigated piecemeal. Appellees' asserted lack of standing to attack isolated portions of the Act is therefore irrelevant 3

II. Whether or not the Bank Secrecy Act is severable, appellees have standing to challenge the reporting requirements 5

ARGUMENT:

III. The District Court's interpretation of the Act and Regulations was entirely consistent with their provisions 9

IV. The "narrower construction" of the reporting requirements now urged by the Government is neither narrow nor relevant 13

V. The reporting requirements of the Act and Regulations violate the Fourth Amendment 15

CONCLUSION 21

Table of Authorities

PAGE

Cases:

Barrows v. Jackson, 346 U.S. 249 (1953) 6, 7, 8
Broderick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830 (1973) 6
Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) 12
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 3

Eisenstadt v. Baird, 405 U.S. 438 (1972) 6, 7, 8

Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924) 5

Gray v. Sanders, 372 U.S. 368 (1963) 12
Griswold v. Connecticut, 381 U.S. 479 (1965) 8

Hale v. Henkel, 201 U.S. 43 (1906) 5
Hoffa v. United States, 385 U.S. 293 (1966) 18

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 12

Marchetti v. United States, 390 U.S. 39 (1968) 4
McGowan v. Maryland, 366 U.S. 420 (1961) 6-7
McMann v. Securities and Exchange Comm'n, 87 F.2d 377 (2d Cir. 1937) 6
Motor Coach Employees v. Missouri, 374 U.S. 74 (1963) 12

NAACP v. Alabama, 357 U.S. 449 (1958) 6, 7

PAGE

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 5

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 7

Truax v. Raich, 239 U.S. 33 (1915) 8

United States v. Jackson, 390 U.S. 570 (1968) 3
United States v. Morton Salt Co., 338 U.S. 632 (1950) 5
United States v. Munsingwear, 340 U.S. 36 (1950) 12
United States v. Raines, 362 U.S. 17 (1960) 6
United States v. W. T. Grant Co., 345 U.S. 629 (1953) 12
United States v. White, 401 U.S. 33 (1970) 17, 18

Williams v. Standard Oil Co., 278 U.S. 235 (1929) 3

Constitutional Provisions:

United States Constitution
First Amendment 7, 18
Fourth Amendment 2, 5, 6, 15, 17, 18, 19, 20, 21
Fifth Amendment 18

Regulations:

31 C.F.R. §103.22(a) 10, 15
31 C.F.R. §103.26 16
31 C.F.R. §103.45 .....8, 9, 10, 11, 12, 13

37 F.R. 23114 (1972) 11

PAGE

Statutes:

18 U.S.C. §1001 16
31 U.S.C. §1052(k) 16
31 U.S.C. §1052(l) 13
31 U.S.C. §1054(b) 11
31 U.S.C. §1055 12
31 U.S.C. §1081 14
31 U.S.C. §1082 ..... 16, 17

Other Authority:

House Report No. 91-975, 2 U.S. Code Cong. & Admin. News 4394 (1970) 16

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(Appellees in No. 72-1073)

Summary of Argument

The government's argument that appellees lack standing to challenge the domestic reporting provisions of the Bank Secrecy Act is both irrelevant and unpersuasive. It is irrelevant because the Act and its regulations comprise a single, unified scheme for the collection of evidence of crime, isolated portions of which cannot be severed or litigated piecemeal. It is unpersuasive because appellees are asserting their own rights, and because appellees meet all the traditional requirements for having standing to assert the rights of those not parties to the litigation.

The government's argument that the District Court acted on "the conjectural outer limits of hypothetical regulations" while ignoring a properly "narrow" construction of the Act is an attempt to take advantage of amendments made after and in response to the District Court's decision, and represents an interpretation of the Act that is not "narrow" at all but reaches everything the District Court read the Act to reach.

The government's argument that the domestic reporting requirements of the Act are "reasonable" is only a plea of utility and convenience to law enforcement—it ignores the requirements of the Fourth Amendment that searches for evidence of crime be reasonable in scope and supported by warrants issued only upon probable cause.

I.

The Bank Secrecy Act is an indivisible whole which cannot be severed or litigated piecemeal. Appellees' asserted lack of standing to attack isolated portions of the Act is therefore irrelevant.

Appellees view the Bank Secrecy Act as an inseparable whole, the fate of which will be decided not only in this appeal but in the two consolidated appeals as well. If this Court in the consolidated appeals reaches the merits, it will be obliged to adjudicate the validity of the entire Act rather than severing the reporting requirements on the ground that no litigant has standing to challenge them.

The best evidence that the Act is an inseparable whole is its lack of a severability clause. This absence, while by no means determinative of the issue, *United States* v. *Jackson*, 390 U.S. 570, 585 (1968), has long been understood to create a presumption that Congress intended the Act to be an indivisible whole. See, *e.g.*, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936); *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241-42 (1929).

The next best evidence of Congressional intent that the Act be an indivisible whole is the interrelationship of its provisions, an interrelationship described at length by the Government itself. In its Jurisdictional Statement (p. 9) the Government charged that the partial injunction issued by the Court below had created "a serious gap in the Bank Secrecy Act that significantly impairs the statutory scheme . . . ," and later (pp. 17-18) expanded upon that theme by saying that the currency reporting requirements "prevent underworld figures from evading the effect of the record-

keeping provisions in Title I and supply leads for determining which records should be summoned or subpoenaed." In its Opening Brief the Government repeats that argument (Gov't OB 40), and offers a "narrow" construction of the Act premised on the theory that Congress intended the reporting requirements to begin precisely where the recordkeeping requirements end; a report will be made of a transaction which otherwise might evade the recordkeeping requirements because conducted "'without leaving a record of the chain of ownership.'" *Id.* at 27. Then the government adds another such argument: that the currency transactions required to be reported are often the beginning or the end of "more sophisticated and complex conversion procedures" that frequently involve the transportation of currency or monetary instruments abroad; thus the absence of the domestic reporting requirements weaken the foreign reporting requirements as well. (*Id.* at 40.)

We think the Government correctly perceives the interrelationship of the entire Act. We add that the empirical and legal assumptions upon which it operates are the same throughout the Act, and note, as did this Court in *Marchetti* v. *United States*, 390 U.S. 39, 56, n. 14 (1968), that there is "no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States."

If the Act is not severable, and if the Court reaches the merits of appellants' claims in the consolidated appeals, then appellees' standing to attack the domestic reporting requirements alone will be irrelevant.

II.

Whether or not the Bank Secrecy Act is severable, appellees have standing to challenge the reporting requirements.

No party to these appeals alleges that he has or will engage in a reportable transaction involving more than $10,000 in currency. Relying on that fact, the Government repeatedly urges or implies (Gov't OB 6, 16, 22, 33) that no appellee has standing to challenge the reporting requirements. Even putting aside for the moment the fact that the reporting requirements have been lessened since the District Court acted, the government's conclusion is incorrect.

There can be no doubt that the bank appellees have standing to challenge the reporting requirements. They alleged and proved that the requirements will injure them financially through loss of customer confidence, and proved in the court below that additional expenditures would be required in order to comply with the $10,000 currency reporting requirements (App. 19-20). Moreover, banks, while perhaps not as fully protected by the Fourth Amendment as private citizens, still enjoy the right to be free from unreasonable searches and seizures. *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906). *See also, United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924). If there is any merit at all in the Government's argument (Gov't OB 31) that the reporting requirements involve only "a bank's own records", then a bank unquestionably has standing to claim that the demand for those records violates

the Fourth Amendment because it is "out of proportion to the end sought." *McMann* v. *Securities and Exchange Comm'n*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.).

On the other hand, any bank customers engaging in transactions required to be reported are entitled to assert their constitutional rights because, as argued *infra*, at pp. 15-21, the Act and Regulations make such reports the joint products of the institution and the customer (as indicated above), because the customer is liable for the truth of the statements made thereon, and because the report is made and the records underlying it are kept not in the ordinary business practice of banks but under the coercion of the Act and Regulations. We argue here that appellees should be entitled to assert the rights of those customers.

We recognize at the outset the general rule that "constitutional rights are personal and may not be asserted vicariously." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 37 L. Ed. 2d 830, 839 (1973). But that rule is "self-imposed", *Eisenstadt* v. *Baird*, 405 U.S. 438, 444 (1972), and "only a rule of practice", *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953), and it may be and has frequently been suspended upon a showing of "weighty countervailing policies", *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Several weighty and countervailing considerations in these appeals support suspension of that rule and allowance to appellees of the right to assert the constitutional rights of those engaging in transactions now required to be reported.

The most traditional reason for permitting assertion of the rights of others is the "reasonable likelihood" of direct economic injury to the litigant itself, *NAACP* v. *Alabama*, 357 U.S. 449, 459-60 (1958). See also *McGowan* v. *Maryland*,

366 U.S. 420, 430 (1961), in which the employee litigants were held entitled to assert the rights of others under the establishment clause of the First Amendment because of "direct economic injury"; and *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925), in which a private parochial school was accorded standing to assert the rights of parents and children not parties to the litigation in order that the school might receive "protection against arbitrary, unreasonable and unlawful interference with [its] patrons." The bank appellees have pleaded and proved, without denial, direct financial injury to themselves as a result of the reporting requirements.

Another traditional factor calling for relaxation of the general rule has been the difficulty or impossibility of assertion of the rights sought to be asserted by those to whom they belong. *Barrows, supra,* at 257; *NAACP* v. *Alabama, supra,* at 459. Any litigant who pleaded and proved that he had engaged and would engage in a reportable transaction would, as in *NAACP* v. *Alabama, supra,* by the very act of litigating sacrifice much of the confidentiality sought to be protected. Worse, he would likely be investigated for criminal activity by the Government, which regards such a transaction as "most likely to be indicative of questionable activity" (Gov't OB 39). Or the Government, in order to avoid the litigation, could grant such a litigant an exemption under the Act and thus end his controversy. The lack of a forum for resolving the controversy was one of the factors that motivated this Court to permit the assertion of rights by others in *Eisenstadt, supra,* at 446, in which those whose rights were asserted were not themselves subject to prosecution under the challenged law.

At bottom the standing requirement serves to ensure an adequately contested case or controversy, as indicated in *Barrows, supra,* at 255, and this Court has frequently relaxed the normal standing requirement where the relationship between the litigant and those whose rights the litigant sought to assert was sufficient to guarantee a fully adversary contest. Thus the employment relationship was found sufficient in *Truax* v. *Raich,* 239 U.S. 33 (1915); the "confidential relationship" between a married couple and a doctor and a Planned Parenthood advisor was found sufficient in *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965); and the relationship between the recipient of contraceptive foam and the "advocate" of her rights, who was willing to risk jail to assert those rights, was found to provide "an adequate incentive" to the litigant in *Eisenstadt, supra,* at 445-46. We submit there is no serious question in this case that it is a fully adversary contest between those with an "adequate incentive" to engage in it. This incentive is especially apparent because appellees here argue in their own appeal that the foreign reporting requirements which they attack —with unquestioned standing—are analytically and constitutionally indistinguishable from the domestic reporting requirements at issue here. See appellants' opening brief in No. 72-1196 at pp. 34-35.

A less traditional but important factor favoring relaxation of the traditional standing requirement is that the asserted lack of standing is the consequence of action taken by the Government appellants, probably with an eye to its effect on this litigation. Since by virtue of 31 C.F.R., §103.45, before it was amended, any bank customer was subject to reporting and therefore had standing to challenge it, the current standing question is one created during the litigation

by the Government itself by its act of amending Section 103.45. This Court ought not to permit questions of standing to be altered by the self-serving and voluntary acts of litigants with an interest in asserting lack of standing.

ARGUMENT

III.

The District Court's interpretation of the Act and Regulations was entirely consistent with their provisions.

The Government in its Opening Brief (hereafter "Gov't OB") condemns the District Court for ignoring the supposedly narrow limits of the domestic reporting requirements of the Act and Regulations and instead engaging in "speculation," Gov't OB 16, about the "conjectural outer limits of hypothetical regulations." *Id.* at 19. Saying that the District Court "entirely disregarded" the Regulations, the Government throughout this contention implies that the only domestic reporting requirement before the District Court concerned transactions involving $10,000 in currency.

This pretense is false, and the fact and chronology of its falsity thoroughly refute the Government's attack on the "conjecture" it ascribes to the District Court. The Government manages to make its entire argument on this point without even mentioning 31 C.F.R., §103.45 (1972), which at the time the District Court ruled permitted the Secretary "in his sole discretion" and "by written order or authorization . . . [to] impose additional . . . reporting requirements authorized by statute, or otherwise modify, the requirements" of any of the regulations. The District Court thus faced not only the currency reporting require-

ment of 31 C.F.R., §103.22(a), but also any reporting requirement that the Secretary might draft and impose, subject to immediate and severe civil and criminal sanctions, on anyone. The Government's professed astonishment, Gov't OB 19-20, that the District Court perceived reporting requirements of monetary instruments as well as currency and small amounts as well as large (App. 80) is a consequence of its tactic of ignoring the existence of Regulation 103.45, a tactic it has pursued throughout this litigation.

Regulation 103.45 was a central focus of attack in the District Court from the beginning of the litigation,[1] and was central to the District Court's reasoning and decision. As the District Court said:

> These reporting provisions of the Act must be considered along with other general provisions [relating to regulatory and exemptive authority]. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations (App. 81).

Throughout the proceedings before the District Court the Government refused to commit a single word to paper concerning the meaning, intent, or effect of Regulation 103.45. On October 28, 1972, after the District Court had ruled and the Government had appealed, but before the Government filed its Jurisdictional Statement in this Court,

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[1] See, *e.g.*, Plaintiffs' Memorandum of Points and Authorities Re: Temporary Restraining Order (in *Stark*) at pp. 3, 10-11, 19, 21, 24-25, 45, 51.

the Secretary promulgated a notice of proposed rule making containing an amendment to Regulation 103.45, which deleted the express language permitting the Secretary to impose additional reporting requirements, 37 F.R. 23114 (1972).[2] Even then, the Government in its Jurisdictional Statement did not attempt to explain the previous meaning of Regulation 103.45; instead it merely noted the fact that the regulation had been amended (p. 22 n. 19).

Now, in a footnote in its opening brief (pp. 29-30, n. 16), remote from its attack on the District Court's "speculation," the Government has finally come to grips with the original meaning of Regulation 103.45 by confessing that "as originally promulgated [it] provided that the Secretary could by written order or authorization . . . expand by additional recordkeeping . . . requirements . . ." the entire regulatory scheme. Asserting without any authority, years after its drafting, that the original regulation was intended "merely . . . to allow the Secretary in appropriate cases to substitute one type of compliance for another—for example, to require lists of currency transactions rather than individual reports," the Government now suggests that the controversy is "moot" because the regulation has been amended.

The Government's tardy and strained interpretation of the original regulation deserves only brief mention because it is frivolous. The statute itself gives the Secretary power to "substitute one type of compliance for another" by requiring "such procedures as he may deem appropriate," 31 U.S.C., §1054(b), or by granting a conditional exemption

[2] The amendments were adopted effective January 17, 1973. See Government's Jurisdictional Statement at 111.

under 31 U.S.C., §1055, and even the amended regulation clearly gives the Secretary such power. The suggestion, therefore, that the "additional . . . requirements" language of the original regulation served so modest a purpose is wholly without substance. The language remains unexplained by the Government because its meaning is obvious —the secretary could, under the original regulation, require any new reports he wanted immediately. Thus the District Court's reading of the reporting requirements, far from being "premature" or "conjectural," was compelled by the law as it then read—unexplained and undefended by the Government.

There is nothing "moot" about the controversy over the legality of the reporting requirements, because banks still must report currency transactions exceeding $10,000 and the legal issues underlying that requirement are the same as those surrounding the original Regulation 103.45.[8]

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[8] Even if the sole issue on this appeal were the validity of the original Regulation 103.45 we would resist the suggestion of mootness because the Secretary's behavior in this case is precisely the "protestations of repentance and reform timed . . . to blunt the force of a lawsuit", *Lankford* v. *Gelston*, 364 F.2d 197, 203 (4th Cir. 1966), that have led this and other courts to reject claims of mootness when illegal conduct has been voluntarily abandoned with an eye toward pending litigation, leaving an underlying controversy unresolved. See, *e.g.*, *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Lankford, supra*. Moreover, the suggestion of mootness based upon change in the underlying law is appropriately made in the court below, not here. *Cf. United States* v. *Munsingwear*, 340 U.S. 36 (1950).

IV.

The "narrower construction" of the reporting requirements now urged by the Government is neither narrow nor relevant.

The Government in its second argument (Gov't OB 24-29) attacks the ruling of the District Court on the ground that the District Court's reading of the reporting requirements was "overly broad" and that a "narrower construction" is available. Taking exception to the District Court's suggestion (App. 80) that the reporting requirements could include any transaction, large or small, and even those involving personal checks, the Government argues that the Act and Regulations must be construed to require the reporting only of transactions in currency or "near currency."

Again in this contention the Government ignores the language of Regulation 103.45, which by itself gave the District Court ample reason to see such scope in the reporting requirements.

Upon examination, the "narrower construction" now offered by the Government is hardly any narrower than the one adopted by the District Court. The Government indicates, Gov't OB 26-27, that Congress intended to give the Secretary power to require reports not only of currency but also of any monetary instrument which " 'may substitute for currency.' " Congress therefore empowered the Secretary, in 31 U.S.C., §1052(l), not only to require reports of currency and numerous bearer instruments but also to require reports of "the equivalent thereof," a power that the Government asserts even extends to personal checks under some circumstances. At page 28, n. 13, the Government gives away most of its "narrower construction" by

anticipating the argument that a personal check may be used as a bearer instrument (for example, by making it out to "cash"), and reserves the right to include such checks in the reporting requirements: ". . . the Secretary might properly determine that such instruments constitute 'monetary instruments' for the purpose of some or all of the provisions of Title II." The only personal checks that the Secretary is currently willing to exclude are those "not drawn or used in such a way" as to become bearer instruments. Already, as the Government admits (Gov't OB 15), the form on which currency transactions must be reported demands information on any *check* involved in the transaction—whether it is "near currency" or not. See also Government's Jurisdictional Statement at 121.

In sum, the "narrower construction" of the reporting requirements urged by the Government admittedly embraces both currency and monetary instruments (except some personal checks of less then $10,000 in some circumstances) and is unlimited, as far as Congress is concerned, either in amount or in detail. While this reading of the statute certainly is consistent with its all-embracing language,[4] it hardly rescues the statute from constitutional attack. Nowhere in its second argument does the Government even attempt to explain why its "narrower construction" might yield any different constitutional result than that adopted by the District Court.

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[4] 31 U.S.C., §1081, which authorizes the reporting requirements, is drafted as broadly as language allows: the transactions may involve "any domestic financial institution", the reports must be made "at such time, in such manner, and in such detail" as the Secretary demands, and include currency "or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

V.

The reporting requirements of the Act and Regulations violate the Fourth Amendment.

The Government begins its constitutional defense of the reporting requirements (Gov't OB 29-42) by arguing that "even under the rationale of the district court" no Fourth Amendment right of bank customers is violated.[5] *Id.* at 29-30. Seizing upon the District Court's statement that, under existing law, a bank customer has no recognized right of privacy in "the bank's own records" (App. 84), the Government urges that the reporting requirements require only information from "'the bank's own records'" and that therefore no right of the customer is infringed. Gov't OB 30-31.

This argument is wrong both factually and legally. It was established by affidavit in the District Court that the $10,000 currency reporting requirement of 31 C.F.R. §103.22 (a) would require additional recordkeeping by banks.[6] The District Court used the phrase, "the bank's own records," in an obvious reference to records that the bank would

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[5] At footnote 14 on page 29 the Government asserts without reasoning or authority that the compulsion of reports "does not constitute a search and seizure, much less an unreasonable search and seizure." That argument is anticipated and refuted at pp. 30-31 of Appellants' Opening Brief in No. 72-1196. Rather than repeat that argument here we will await the government's response in No. 72-1196.

[6] See App. 19-20, in which in an affidavit the Senior Vice President and General Counsel of the Bank of America indicated that compliance with the $10,000 currency reporting requirement would force his bank to spend "additional sums of money for . . . record keeping equipment and material." This fact is nowhere denied by the Government.

make or keep in the ordinary course of business. The Government uses the phrase to embrace records that banks would not otherwise make or keep but which are forced upon them by the Act and Regulations.

The Act requires that the report "shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require." 31 U.S.C., §1082.[7] The same section requires any party not acting only for himself to disclose his principal. The Act defines the reports as "statements and representations" within the meaning of 18 U.S.C., §1001, which punishes false, fictitious and fraudulent statements by criminal sanction. See 31 U.S.C. §1052(k). A report required by law to be signed by the party to the transaction as well as the financial institution, the truth of which is guaranteed by the signator on pain of criminal penalty, is at the very least a joint product of both the party and the institution and can hardly be classified "a bank's own record."

The Secretary has implemented this statutory command by distributing a "Currency Transaction Report," which is appended to the Government's Jurisdictional Statement at pp. 121-26. The Report, as well as the Regulations,[8] require detailed identification of the party to the transaction, including his Social Security number and the number of his driver's license or other identifying document. Jurisdic-

[7] The phrase, "as the Secretary may require," in Section 1082 clearly gives the Secretary power to choose which and how many participants sign—not whether any sign at all. Congress, as the legislative history repeatedly shows, sought the customer's signature both for the purpose of giving notice and to establish liability for false statements. See *e.g.* House Report No. 91-975, 2 U.S. Code Cong. & Admin. News 4394, 4407 (1970). See also 31 U.S.C., Section 1052(k).

[8] See 31 C.F.R., §103.26.

tional Statement at 121. It is clearly a joint product of the institution and the party; the instructions to the institution require that the *party* enter his individual or organizational name, *id.* at 123, although other details may be gathered and from the party entered by employees of the institution.

It is doubtful that the Currency Transaction Report now promulgated by the Secretary complies with the mandate of 31 U.S.C., §1082, that the report "shall be signed or otherwise made" not only by the institution but also by one or more parties to the transaction. However, the Secretary's temporary dereliction in this respect hardly affects the outcome of this appeal; the law requires that the report be signed or otherwise made by the bank and the customer, and the customer is criminally liable if the report is false. The Government, therefore, has no basis whatever for asserting that the rights of the customer are unaffected and that "no seizure of any tangible or intangible property of the bank customer is involved" (Gov't OB 33).

The Government next argues (*id.*) that banks and bank customers have no reasonable expectation of privacy in the details of reportable transactions because the customer, by analogy to *United States* v. *White,* 401 U.S. 33 (1970), can have no "expectation that the other party to the conversation will not disclose the contents of the conversation . . . ." While there are numerous distinctions between this case and the cases dealing with the Fourth Amendment consequences of the communication of information from an informant to the police,[9] the central difference is that in this case the information is coerced from the bank,

[9] One such difference is that banks are bound by contract to respect the privacy of a customer's account. See Appellants' Opening Brief in No. 72-1196 at pp. 27-28.

whereas in *United States* v. *White* and its related cases the information is disclosed voluntarily. In *White* the informant concealed policemen in his house "with [his] consent," 401 U.S. at 747, and voluntarily caused the disclosures. This Court held, relying upon *Hoffa* v. *United States*, 385 U.S. 293 (1966), that the Fourth Amendment does not protect "'a wrongdoer's misplaced belief that a person to whom he *voluntarily* confides his wrongdoing will not reveal it.'" 401 U.S. at 749 (emphasis added).

The Government is quite right in asserting (Gov't OB 33-34) that a bank customer may not expect his bank to ignore "a grand jury subpoena or other lawful process." Nearly all reasonable expectations of privacy can be overcome by lawful process. The flaw in the reporting requirements of the Bank Secrecy Act, however, is precisely that they do *not* involve a summons, subpoena, or other lawful process, but instead coerce routine reports of usually innocent transactions without any prior judicial superintendance.

Finally,[19] the Government argues (Gov't OB 35-40) that the $10,000 reporting requirement is reasonable under the Fourth Amendment. This argument appears to rest upon previous experience with currency reporting under the Trading with the Enemy Act and the claim that the reports will be useful in combatting crime. Neither of those contentions makes the reporting requirements reasonable.

The Trading with the Enemy Act has nothing to do with the question of the reasonableness of the reporting require-

[19] The Government's arguments concerning the Fifth and First Amendment claims of appellees (Gov't OB 34-35; 41-42) have also been anticipated and discussed in Appellants' Opening Brief in No. 72-1196 at pp. 44-59; we will reserve our response for our reply brief in that appeal.

ments at issue here. The constitutionality of its reporting requirements has never, to our knowledge, been litigated. The information required by the Trading with the Enemy Act is reproduced at page 130 of the Government's Jurisdictional Statement; it is scanty in comparison to the Currency Transaction Report now required under the Bank Secrecy Act (see Gov't Jurisdictional Statement at 121-26). Far from being a joint product of the customer and the institution, the report required under the Trading with the Enemy Act was, according to the Secretary of the Treasury in 1959, "not [to] be divulged to the customers of the reporting institutions." *Id.* at 128. Most importantly, however, the determination of whether to report under the Trading with the Enemy Act was subjective and was to be made by the reporting institutions themselves. The Government twice describes the regulation as requiring a judgment about whether the transaction was "legitimate." [11] As the Government itself points out, the Bank Secrecy Act was enacted partly in order to shift the judgment of legitimacy from the reporting institutions to the Government by removing the subjective element of the old law and replacing it with "definite standards" (Gov't OB 39).

The balance of the Government's Fourth Amendment defense of the reporting requirements (Gov't OB 37-40) is nothing more than an argument that the reports will be "eminently useful" because they will sometimes disclose criminal activity. Relying on the legislative history, the Government points out that various criminal schemes involve large currency transactions and that therefore the reports can help to detect such schemes and to "supply

[11] See Jurisdictional Statement at 15; Gov't OB 12.

leads for determining which records should be summoned or subpoenaed." *Id.* at 40.

We do not deny that a few of the reports required by the Act may prove to be useful in investigating crime. We argue,[12] however, that the reporting requirements are unreasonable because they lack judicial supervision, are excessive in scope and are required without probable cause. The Government in its Opening Brief, does not address the warrant requirement; indeed, it appears to concede—as it must—that there is no probable cause to suspect crime in a reportable transaction (Gov't OB 38-39). The most the Government can say is that such a transaction

> . . . is most likely to be indicative of questionable activity. Indeed, it is difficult to see how the requirement could be drawn any more narrowly unless the burden of reporting were defined in terms of actual suspicion on the part of bank officials as to the legitimacy of the transaction. While overtly suspicious transactions might well be reported in any event, it is not ordinarily the province of bank officials to inquire as to the purpose of their customers' bank transactions . . . . *Id.* at 39.

Thus the Government apparently regards the transactions as less than "suspicious" but "likely" to be "questionable."

These are not the standards for searches which comply with the Fourth Amendment. A seizure admittedly intended to detect crime undertaken on less than probable cause violates that Amendment, and these seizures, according to the Government, are undertaken on even less than suspicion.

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[12] See Appellants' Opening Brief in No. 72-1196 at pp. 31-39.

We think it plain that seizures of documents concerning whole categories of transactions which the Government regards as "questionable" are impermissible under the Fourth Amendment.

CONCLUSION

For all of the aforementioned reasons, appellees urge this Court to affirm the partial preliminary injunction granted by the District Court.

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Respectfully submitted,

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